

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

RONNIE TROXEL,	:	
	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-12-083
	:	
- vs -	:	<u>OPINION</u>
	:	9/27/2010
	:	
MARSHA RYAN, Administrator, Bureau of	:	
Workers' Compensation, et al.,	:	
	:	
Defendants-Appellants.	:	
	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2006CVD01621

Brown, Lippert & Laite, David A. Laite, 30 Garfield Place, Suite 640, Cincinnati, Ohio 45202, for plaintiff-appellee

Richard Cordray, Ohio Attorney General, Steven P. Fixler, 1600 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, for defendant, Marsha Ryan

Fox & Fox Co., L.P.A., Bernard C. Fox, Jr., M. Christopher Kneflin, 2407 Ashland Avenue, Cincinnati, Ohio 45206, for defendant-appellant, Kenneth Atwell

BRESSLER, J.

{¶1} Defendant-appellant, Kenneth Atwell, appeals the decision of the Clermont County Court of Common Pleas, finding plaintiff-appellee, Ronnie Troxel, eligible to participate in the Workers' Compensation fund. We affirm the decision of the court.

{¶2} Troxel and Atwell knew each other personally before Troxel began working

for Atwell in 2003 doing various plumbing and construction work. On September 29, 2003, Troxel was prepared to report to a remodeling job at a coffee shop when Atwell called him and told him to come to a personal residence instead to work on constructing a laundry room. Atwell and Troxel made preparations for the laundry room, and began the project after Atwell purchased the necessary materials.

{¶3} While using Atwell's miter saw to cut two-by-fours to create walls for the laundry room, Troxel cut his hand and fingers when the saw moved unexpectedly. Portions of Troxel's left index finger and left middle finger were severed, and Atwell wrapped them in a clean shirt and took Troxel to the hospital in the hopes of having the fingers reattached.

{¶4} Troxel testified that on the way to the hospital, Atwell asked him to tell the hospital personnel that he was unemployed and had been helping Atwell by cutting boards for him. Because of their personal relationship, Troxel agreed, and told hospital personnel that he was unemployed and had been hurt when helping Atwell cut boards. However, a week later, Troxel filed a workers' compensation claim.

{¶5} Troxel also testified that Atwell became "irate" when he learned that Troxel had filed a claim. Atwell made multiple calls to Troxel, trying to dissuade him from pursuing the claim, and suggested using home owners' insurance protection, or writing the medical charges off on Troxel's taxes. After the irate calls lasted more than a week, Troxel called Atwell and resigned.

{¶6} The Industrial Commission of Ohio allowed Troxel's claim, and Atwell appealed the decision to the Clermont County Court of Common Pleas. The court held a bench trial, upheld the Commission's finding, and entered judgment that Troxel was entitled to participate in the Workers' Compensation fund. Troxel now appeals the decision of the court, raising the following assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT APPLYING THE MANDATES OF R.C. §4123.01(A)(1)(c) IN THIS MATTER."

{¶9} In his first assignment of error, Atwell asserts that the court erred by not applying the correct statutory provisions in order to determine whether Troxel was an employee or an independent contractor. This argument lacks merit.

{¶10} When deciding whether an injured worker is an employee or an independent contractor for purposes of workers' compensation, courts applying common law factors have relied on the Ohio Supreme Court's decision in *Bostic v. Connor* (1988), 37 Ohio St.3d 144. In *Bostic*, the court found that "the key factual determination is who had the right to control the manner or means of doing the work." *Id.* at syllabus.

{¶11} In 1996, Ohio's General Assembly promulgated R.C. 4123.01(A)(1)(c), which lists 20 factors for consideration when determining a worker's status as either an employee or independent contractor. According to the statute, the factors apply to "every person who performs labor or provides services pursuant to a construction contract, as defined in section 4123.79 of the Revised Code." R.C. 4123.79 defines construction contract as "any oral or written agreement involving any activity in connection with the erection, alteration, repair, replacement, renovation, installation, or demolition of any building, structure, highway, or bridge."

{¶12} Atwell asserts that the court incorrectly relied on the common law test and failed to consider the pertinent R.C. 4123.01(A)(1)(c) factors in reaching its decision. While Atwell now argues that the parties were operating under an oral construction contract pursuant to the statute, his argument to the common pleas court was very different.

{¶13} During closing arguments of the bench trial, Atwell's counsel stated

multiple times that the parties were not acting under a contract. "Let's talk about the statute, 4123.01(c). For that to apply, there has to be a construction contract, *** here there is no construction contract." Counsel went on to state, "now, I'm saying you shouldn't even go there. I'm saying that (c) doesn't apply, so that's point number 1; there is no construction contract based on the testimony that we've seen."

{¶14} After the bench trial, the court issued a general written decision finding Troxel eligible to participate, but did not specifically make findings of fact or conclusions of law. The court's opinion also neglected to reference what test it applied before making its judgment.

{¶15} According to Civ.R. 52, "when questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ.R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law." However, Atwell never requested that the court issue findings of fact or conclusions of law pursuant to Civ.R. 52, and we are therefore left with reviewing the court's general decision.

{¶16} Within the court's written decision, it references the *Bostic* standard, and concluded that "the totality of the evidence persuades the court that the Defendant did in fact direct the manner and means of Plaintiff's work and that Plaintiff was in fact 'in service' under the Worker's Compensation laws of Ohio at the time of the injury." The court did not make any reference to the R.C. 4123.01(A)(1)(c) factors so that we will assume first that it applied the common law test.

{¶17} "Judgments supported by some competent, credible evidence going to all

the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280. Because the trial court is best able to view the witnesses, observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the witnesses, a reviewing court will presume that the trial court's decision regarding witness credibility and factual conclusions are accurate. *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77.

{¶18} As stated above, the court in *Bostic* found that "the key factual determination is who had the right to control the manner or means of doing the work." 37 Ohio St.3d at syllabus. "In addition to the 'right to control,' some other indicia of the employment versus independent contractor relationship are (1) whether the one employed is engaged in a distinct occupation or business; (2) whether the work is done by a specialist, requiring a particular skill; (3) whether the worker or the employer supplies the place and requisite instrumentalities; (4) the length of time for which the person is employed; (5) the method of payment, whether by the time or by the job; and (6) whether the work is a part of the regular business of the employer." *Harmon v. Schnurmacher* (1992), 84 Ohio App.3d 207, 212, citing *Gillum v. Indust. Comm.* (1943), 141 Ohio St. 373, 381-382.

{¶19} According to the common law right to control test and pertinent factors, the court properly held that Troxel was Atwell's employee. The court heard testimony that Atwell controlled the manner and means of Troxel's work in that he determined where and when Troxel would work. Troxel testified that on the morning of the accident, he was prepared to go to the coffee shop to work on the remodeling there until Atwell called and told him to come to the private jobsite and work on the laundry room. Troxel also testified that Atwell would decide and tell him exactly what the work day was going to

consist of, and even directed where equipment would be set up on job sites.

{¶20} Regarding the other factors, the trial court heard evidence that Troxel did both plumbing and construction work for Atwell, and that he was required to have his plumber's license in order to perform the plumbing work. The court also heard evidence that Atwell provided several tools for Troxel to use, and also furnished the necessary materials to complete the job. Troxel also testified that he worked for Atwell from approximately March 2003 until a week after the accident in September 2003. During that time, Atwell would pay Troxel weekly by check based on wages of \$15/hour for construction work and \$20/hour for plumbing. According to the evidence at trial, the construction and plumbing work Troxel performed was part of Atwell's regular business as the owner of Atwell's Plumbing and Remodeling.

{¶21} After reviewing the record, we find that the court's ruling was based on competent and credible evidence, and was not against the manifest weight of the evidence. Atwell's first assignment of error is overruled.

{¶22} Assignment of Error No. 2:

{¶23} "THE TRIAL COURT ERRED IN ITS DECISION FINDING PLAINTIFF ENTITLED TO PARTICIPATE IN THE BENEFITS OF THE WORKERS' COMPENSATION SYSTEM FOR HIS INJURY AS PLAINTIFF WAS NOT AN EMPLOYEE OF THE DEFENDANT PURSUANT TO R.C. 4123.01(A)(1)(c)."

{¶24} In his second assignment of error, Atwell argues that the court erred in finding that Troxel was his employee based on the factors listed in R.C. 4123.01(A)(1)(c). There is no merit to this argument.

{¶25} In the alternative, if the common pleas court applied 4123.01(A)(1)(c) in order to determine Troxel's status, it did not err in finding that Troxel was an employee. According to the statute, a worker has employee status should they fulfill ten out of the

20 listed criteria. Based on the evidence offered at trial, Troxel was able to demonstrate that he fulfilled the following factors.

{¶26} "(i) The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services." The court heard testimony that Atwell would tell Troxel where to report for work, and that Atwell decided what the work day would consist of. Troxel also testified that Atwell would tell him where to set up the equipment, and did so on the day of the accident.

{¶27} "(iii) The person's services are integrated into the regular functioning of the other contracting party." Troxel testified that Atwell would often pick him up in the morning and drive him to the work site for the day, and that Atwell would set the terms for the work Troxel would perform on any given job.

{¶28} "(iv) The person is required to perform the work personally." The court heard evidence that Troxel was paid an hourly rate, and only received a paycheck when he performed work for Atwell. Similarly, section (v) requires that "the person is hired, supervised, or paid by the other contracting party." Troxel testified that Atwell hired him, and agreed to pay him via weekly checks. Atwell paid Troxel for the work he did, and Troxel submitted copies of the checks he received as evidence of Atwell's payments. The court also heard evidence that Atwell supervised Troxel by telling him where to set up equipment and where, when, and how to work on a job site.

{¶29} "(vi) A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time." Troxel testified that he worked for Atwell from March 2003 through September 2003, and that he worked on multiple jobs for Atwell throughout their working relationship.

{¶30} "(vii) The person's hours of work are established by the other contracting

party." The court heard evidence that Atwell set Troxel's work hours, and also decided when Troxel would break for lunch. Troxel also testified that Atwell determined at what time the work day was complete.

{¶31} "(x) The person is required to follow the order of work set by the other contracting party." Troxel testified that Atwell "lined up the jobs," and told Troxel where to work on a given day. As mentioned above, Atwell called Troxel on the day of the accident and told him to report to the private residence to build the laundry room, rather than having Troxel report to the coffee shop as previously planned. Once at the private residence, Troxel followed Atwell's directions and started cutting boards to create the laundry room.

{¶32} "(xii) The person is paid for services on a regular basis such as hourly, weekly, or monthly." The court heard evidence that Atwell paid Troxel \$15 an hour for any remodeling or construction work that he did, and \$20 an hour for any plumbing work performed. The court also heard testimony that Atwell kept track of Troxel's hours, and paid him accordingly.

{¶33} "(xiii) The person's expenses are paid for by the other contracting party." The court heard evidence that Atwell paid for the building materials used to complete the various jobs, and that Atwell often paid for Troxel's lunch and fuel expenses when Troxel used his own vehicle on a job. Troxel also testified that Atwell gave him three "Atwell's Plumbing and Remodeling" shirts to wear while working.

{¶34} "(xiv) The person's tools and materials are furnished by the other contracting party." Both Atwell and Troxel testified regarding Troxel's use of Atwell's tools on the job site. For example, at the time of the accident, Troxel was using Atwell's miter saw to cut boards. Atwell also made his other tools available for Troxel's use on the job sites.

{¶35} "(xvi) The person does not realize a profit or suffer a loss as a result of the services provided." The court heard evidence that Troxel was paid an hourly rate for all of the work he did, regardless of a job being completed or what payment was made by the person seeking the construction or plumbing work.

{¶36} "(xvii) The person is not performing services for a number of employers at the same time." Troxel testified that he had several jobs before working for Atwell. During that time, Troxel would often work on several side-jobs as owner of his own company, "All-In-One Mechanical." However, during the time he worked for Atwell, he did not have any side-ventures and did not work under All-In-One.

{¶37} "(xx) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement." The trial court heard evidence that Troxel called Atwell approximately a week after the accident, and quit his job without any repercussions.

{¶38} After reviewing the record, we find that Troxel demonstrated that he was Atwell's employee by fulfilling 13 out of the 20 factors. If the court applied R.C. 4123.01(A)(1)(c) in reaching its decision, the record contains the competent, credible evidence to uphold the court's finding. Atwell's second assignment of error is overruled.

{¶39} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.